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NAFTA: RESOLVING CONFLICTS BETWEEN TREATY PROVISIONS AND DOMESTIC LAW

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February 1993



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NAFTA: RESOLVING CONFLICTS BETWEEN TREATY PROVISIONS AND DOMESTIC LAW

INTRODUCTION

According to the dualist theory of law prevailing in Canada, international law and domestic (Canadian) law are separate and independent systems.⁽¹⁾ Although international law has no direct application within our borders, it is entirely possible that the provisions of a treaty could, despite the fact it had been implemented here, come into conflict with existing domestic law. The solution to the conflict would depend on the tribunal ruling on it.

This document will look at conflicts between treaty provisions and domestic legislation, taking as its example the North American Free Trade Agreement (NAFTA). It will begin with a discussion of the procedure for ratifying treaties and passing legislation and will conclude with an explanation of the basic principles of implementing and interpreting treaties and laws.

NEGOTIATING, CONCLUDING, RATIFYING AND IMPLEMENTING TREATIES

When the Free Trade Agreement (FTA) between Canada and the United States was concluded, the government of Mexico showed strong interest in reaching a similar agreement on freer trade with the United States. Faced with the prospect of imminent negotiations between Washington and Mexico City, Ottawa asked to take part in those negotiations, so that an eventual agreement would include the entire North American continent.⁽²⁾

(1) The opposing theory is the monist, which holds that international and domestic law form one complete body of law within which there is a hierarchy giving international law precedence.

(2) The European common market became, on 1 January 1993, a bloc of 345 million consumers, while if NAFTA is ratified the North American continent will form a free trade zone of over 360 million consumers. D. Seux, "L'Amérique du Nord fait son marché," *Nouvel Economiste*, No. 857, 21 August 1992, p. 10; L.P. Dana, "Why We Must Join NAFTA," *Policy Options*, Vol. 13, March 1992, p. 6.

If NAFTA comes into force, it will, like the FTA, be an international treaty, in other words an agreement between States. But before the agreement could be reached, representatives of Canada, the United States and Mexico had to discuss the proposed provisions at considerable length and agree on each of them. Once that was done, the Agreement was said to have been concluded. NAFTA will now have to be submitted to the Governor General in Council (the Cabinet) for approval, and that approval will mark its ratification. Canada as a State will then be responsible for implementing the Agreement. The commitments that Canada makes can, however, entail the passage or amendment of legislation. This final stage is the implementation of the Agreement.

While the first three stages (negotiation, conclusion and ratification) are under the control of the federal executive, the fourth (implementation) is in Parliament's hands, or in the hands of the provincial legislatures because of the division of legislative jurisdiction within the Canadian federation.⁽³⁾

PROCEDURE FOR IMPLEMENTING TREATIES

The Canadian Parliament approved the FTA when it passed the *Canada-United States Free Trade Implementation Act*.⁽⁴⁾ More specifically, section 5 of that Act declares that the Agreement has been approved. The effects of such a provision are open to interpretation. It could be argued that the FTA thereby becomes directly applicable under domestic law, but it could equally be argued that it is necessary to implement the FTA's provisions by one or more special Acts of Parliament. Since NAFTA's terms and structure do not respect legal drafting "norms," and to avoid problems with interpretation, it would be advisable for Parliament to implement this second trade agreement by passing specific legislation to that effect.

(3) The Privy Council's ruling in 1937 in *Labour Conventions* case determined that implementation of a treaty in Canada depends on the subject of that treaty. Because of the division of legislative powers between Parliament and the legislative assemblies of the provinces, the subject of the treaty determines which has the authority to implement the treaty, or the relevant provisions. *A.G. for Canada v. A.G. for Ontario* (1937) A.C. 326 (P.C.).

(4) S.C. 1988, c. 65. It is reasonable to anticipate that the procedure for implementing NAFTA would resemble the procedure used to implement the FTA.

For instance, to make applicable the provisions of Chapter 13 of the FTA, the *Canada-United States Free Trade Agreement Implementation Act* provides for the establishment of the Procurement Review Board.⁽⁵⁾ The Act also amends a number of federal Acts to bring them into line with the FTA's provisions.⁽⁶⁾

Similarly, a number of NAFTA's provisions will require amendments to existing legislation or the passage of new legislation. Moreover, in certain cases NAFTA stipulates the legislative amendments that the parties to the Agreement are committed to making. For example, annex 1904.15 of NAFTA provides that Canada shall amend its *Special Import Measures Act* so as to facilitate the application of chapter 19 of the Agreement, dealing with the review and settlement of disputes over antidumping and countervailing duties.

APPLICATION AND INTERPRETATION OF LAWS AND TREATIES

As noted at the beginning of this document, Canadian domestic law constitutes a system of legislation independent of international law. Similarly, the judicial system responsible for applying and interpreting the rules of law formed by Canadian legislation consists of all the country's various judicial and administrative tribunals, and is separate from the dispute-settlement mechanisms responsible for applying and interpreting treaties. Our domestic tribunals apply only the laws passed by our legislative bodies, and thus in general apply the provisions of a treaty only if these have been implemented by an appropriate domestic law.

(5) Ss. 13-22 of the *Canada-United States Free Trade Agreement Implementation Act*.

(6) *Special Import Measures Act*, R.S. 1985, c. S-15; *Department of Agriculture Act*, R.S. 1985, c. A-9; *Bank Act*, R.S. 1985, c. B-1; *Broadcasting Act*, R.S. 1985, c. B-9; *Canadian International Trade Tribunal Act*, S.C. 1988, c. 56; *Canadian Wheat Board Act*, R.S. 1985, c. C-24; *Copyright Act*, R.S. 1985, c. C-42; *Customs Act*, R.S. 1985, c. 1 (2nd Supp.); *Customs Tariff*, S.C. 1987, c. 49; *Excise Tax Act*, R.S. 1985, c. E-15; *Export and Import Permits Act*, R.S. 1985, c. E-19; *Canada Grain Act*, R.S. 1985, c. G-10; *Importation of Intoxicating Liquors Act*, R.S. 1985, c. I-3; *Income Tax Act*, R.S. 1952, c. 148 and S.C. 1970-71-72, c. 63; *Canadian and British Insurance Companies Act*, R.S. 1985, c. I-12; *Investment Canada Act*, R.S. 1985, c. 28 (1st Supp.); *Investment Companies Act*, R.S. 1988, c. I-22; *Loan Companies Act*, R.S. 1985, c. L-12; *Meat Import Act*, R.S. 1985, c. M-3; *Meat Inspection Act*, R.S. 1985, c. 25 (1st Supp.); *National Energy Board Act*, R.S. 1985, c. N-7; *Seeds Act*, R.S. 1985, c. S-8; *Standards Council of Canada Act*, R.S. 1985, c. S-16; *Statistics Act*, R.S. 1985, c. S-19; *Trust Companies Act*, R.S. 1985, c. T-20; *Western Grain Transportation Act*, R.S. 1985, c. W-8.

They will refer to the text of a treaty only to clarify the drafter's intentions where these are not sufficiently evident in the implementing legislation. Should there prove to be an inconsistency between the terms of the treaty and the legislative provisions, domestic tribunals will give precedence to domestic legislation.

It can happen that Parliament, either deliberately or inadvertently, fails to transpose into legislation the commitments made by Canada in signing a treaty. With NAFTA as our example, the question that immediately comes to mind is: What would happen if Parliament did not pass the amendments required by annex 1904.15? To make sure the implications are clearly understood, let us examine one of the annex's elements more closely.

The first article in annex 1904.15 requires Canada to amend sections 56, 58 and 59 of the *Special Import Measures Act*. To live up to its obligations, Canada must pass the required amendments, either by including them in the Act implementing NAFTA or by bringing in separate legislation. What would happen if Parliament did not pass the amendments to the *Special Import Measures Act*?

First, any Canadian court that had to rule on a matter involving the relevant provisions in the Act would have to apply them as they now stand without being amended. The courts cannot, on their own initiative, amend a law that Parliament has not amended, even if such a "judicial" amendment is attempted with the aim of enforcing respect for a treaty. Parliament is supreme in the passage and amendment of its legislation, and no court may usurp this function. By applying the unamended version of the law, a court would be running the risk of putting Canada in contravention of the provisions of NAFTA; however, it would have no choice and would not be obliged to concern itself with the consequences.

To ascertain those consequences, we must determine in whose interest it is that Canada live up to its treaty obligations. Without going into great detail, let us simply recall that the relevant provisions in the *Special Import Measures Act* deal with the levying of duty determined by a customs officer following a ruling by the Canadian International Trade Tribunal, and with the possibility of obtaining a re-determination. Clearly the American and Mexican governments would be as interested as individual producers, exporters and importers in making Canada respect its NAFTA obligations.

A failure by Canada to respect those obligations could become a dispute within the meaning of NAFTA's provisions if an interested party so decided. This dispute would have to be settled under the procedures provided for in the Agreement. The body⁽⁷⁾ responsible for resolving the dispute would give precedence to the text of the Agreement over any inconsistent Canadian legislation. If it was ruled that Canada had contravened the Agreement, the country importing the goods to Canada might well decide to levy countervailing duties on Canadian goods to offset the effect of Canada's contravention.

As we have seen, the domestic court does not take into account the effect of the treaty in reaching its decision. In the same way, if the legislation implementing a treaty is subsequently amended by Parliament in a way that is contrary to the terms of that treaty, a domestic court would have to apply the law as it stood (i.e., as amended) without regard to the fact that it was contrary to a treaty.

COMMENTARY ON CLAUSE 8 OF BILL C-130

In 1988, when the first attempt was made to have Parliament ratify the Canada-US Free Trade Agreement, Bill C-130 contained the following clause:

8. (1) Notwithstanding anything in any other Act or law, in the event of any inconsistency or conflict between

(a) this Act, or any regulation made under this Act, or the Agreement, and

(b) a provision of any other Act of Parliament or of any regulation within the meaning of section 2 of the *Interpretation Act*, other than a provision as enacted or amended by Part III or IV of this Act or of any regulation made under a provision as so enacted or amended,

the provision is inoperative and of no force or effect to the extent of the inconsistency or conflict.

(2) No person shall, in the purported performance of duties or functions under any law of Canada, do any act, exercise any power or carry on any practice that is inconsistent with or

(7) Given the complexity of the NAFTA dispute settlement mechanism, this document will not go into the subject in any detail.

contravenes this Act or any regulation made under this Act, or the Agreement.

While the principles of interpretation give precedence to the application of domestic law in domestic courts, clause 8 would have given precedence to the FTA and its implementing legislation.⁽⁸⁾

This clause disappeared when the bill was considered in committee. Although we do not have their precise reasons for doing so, the members of the committee voted unanimously against the clause, forcing its removal from the bill.⁽⁹⁾ It should be noted that, although the bill was passed by the House, it had not been passed by the Senate at the time a general election was called by the Prime Minister in the fall of 1988. The new government reintroduced a bill (C-2) to implement the FTA, which was rapidly passed by Parliament and received Royal Assent on 30 December 1988. Bill C-2 did not contain a clause similar to its predecessor's clause 8.

As we have seen, the effect of Bill C-130's clause 8 would have been to amend the principles of interpretation applicable in Canada. It would have given the terms of a treaty precedence over the provisions of domestic law.

INTERPRETATIONAL CONFLICTS BETWEEN TREATIES AND AMERICAN DOMESTIC LAW

In the United States a different situation obtains. No treaty provision can take precedence over an inconsistent provision in federal legislation, although treaties do take precedence over inconsistent state legislation. The U.S. Congress incorporated in its Act implementing the FTA a provision that restated this fact.

There are grounds for wondering whether the American situation may have influenced the committee's decision to remove clause 8 from the original implementing bill.

(8) See the testimony of the Honourable John C. Crosbie, then Minister for International Trade, before the legislative committee studying the proposed legislation to implement the FTA. *Minutes of Proceedings and Evidence*, Legislative Committee on Bill C-130, Issue No. 2, 11 July 1988, p. 38-40.

(9) *Minutes of Proceedings and Evidence*, Legislative Committee on Bill C-130, Issue No. 22, 3 August 1988, p. 33.

Implementing a country's international responsibility following its failure to live up to its treaty obligations is very different from the application of treaty provisions by a domestic court. The principles of interpretation are different in international law, where the body responsible for interpreting the treaty would give it precedence; the domestic tribunal would give precedence to the legislation in effect.

The Canadian government could decide to attack any American legislation that flouted NAFTA provisions. To do so, it would simply have to make use of the dispute settlement mechanism provided for by NAFTA. Since the body that hears such disputes derives its authority from NAFTA, it would normally give the terms of the Agreement precedence over any inconsistent domestic legislation. There are grounds for assuming that the United States could thus be declared in contravention of its NAFTA obligations.

CONCLUSION

As we have seen, regardless of whether it is a party to a treaty, each country remains sovereign in adopting its own legislation. On the domestic level, the courts will apply only the legislation in effect - that is, the laws passed by the competent legislative bodies - and they will not consider intrinsic treaty provisions.

While applying domestic legislation may have the effect of placing a country in contravention of the provisions of a treaty, a domestic court is not obliged to consider such consequences when it hands down its decision. The domestic judicial system is distinct from the international judicial system. Each system of law applies its own rules of interpretation, the primary rule being to give precedence to its own rules of law.

Although the conflicts between the two systems of law are evident, the countries involved do not seem inclined to find a political solution to the problem, out of respect for the other's sovereignty. Once treaties have been passed and implemented, they allow the competent "judicial" bodies to render their decisions without intervening.

Consequently, one may assume that American trade tribunals will continue to impose duties on Canadian exports and that the groups of experts appointed under the FTA or NAFTA will continue to reverse their decisions.



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